IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 978 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA

HON'BLE SMT. JUSTICE ABHILASHA KUMARI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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THE STATE OF GUJARAT - Appellant(s)
Versus
VINODKUMAR SHIVKUMAR SOLANKI (DARBAR) & 1 – Opponent(s)

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Appearance :
Mr.K.C.Shah,learned APP for Appellant(s) : 1,
MR YM THAKORE for Opponent(s) : 1 – 2.

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA

and

HON'BLE SMT. JUSTICE ABHILASHA KUMARI

Date : 18/09/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.R.VORA)

1. Leave to appeal granted. Appeal is admitted. Learned advocate Mr.Y.M.Thakore waives for respondents.

2. Upon request of learned advocate for the respondents, this matter is taken up for final hearing today as Record and Proceedings are available with us and that learned APP as well as Mr.Y.M.Thakore assured to assist this court with extra copies of the evidence and documents produced before trial Court.

3. Instant appeal is preferred by the State under Section 378 of the Code of Criminal Procedure against the judgment and order delivered by learned Sessions Judge, District Mehsana on 7th January,2005 in Sessions Case No.219 of 2004. Both the respondents

herein being accused of the Sessions Case were charged for the offences punishable under Section 302 to read with Section 34 of the Indian Penal Code. Vide judgment and order impugned, respondent No.1 herein – accused No.1 Vinodkumar Shivkumar Solanki came to be acquitted by the trial court for all the charges levelled against him while accused No.2 -respondent No.2 herein Champaben Shivkumar Javansinh though was acquitted of the charge levelled against her under Section 302 to read with Section 34 of the Indian Penal Code but she was convicted for the charge proved against her under Section 304 Part II of the Indian Penal Code and she was sentenced to undergo rigorous imprisonment of five years and to pay fine of Rs.5000/-. However, the instant appeal pertains to the acquittal orders passed by the trial court in respect of both the accused while we are informed at Bar that no appeal has been preferred by respondent No.2 herein for her conviction and sentence, as aforesaid.

4. Prosecution case briefly stated is in respect of murder committed of Shivkumar Javansinh Solanki serving as Head Constable at Mehsana Police Headquarters. Present respondent No.1 Vinodkumar

Shivkumar Solanki is son of deceased, while respondent No.2 Champaben Shivkumar Javansinh is widow of deceased Shivkumar Javansinh Solanki. According to prosecution case deceased Shivkumar Javansinh Solanki was drunkard and was staying alongwith respondent No.2 at Police Headquarters in a Government quarter allotted to him at Mehsana. A year before the incident, deceased was serving at Kadi and came in contact with one Lilaben Amratji, resident of Kainpura and deceased developed illicit relationship with Lilaben. This caused displeasure and annoyance amongst family members of the deceased and though deceased was persuaded but he did not heed any advice of any family members. As per the prosecution case, while respondent No.2 Champaben was staying with deceased, the conduct of deceased was improper and he was beating Champaben. Vinodkumar Shivkumar Solanki – respondent No.1 was staying at Becharpura with his wife Geetaben and before 17th September, 2004 he visited Mehsana and met her mother at the residence of his father. When Vinodkumar Shivkumar Solanki inquired about his father, respondent No.2 stated that on that morning deceased had gone out with his clothes and, thereafter, respondent No.1 Vinodkumar Shivkumar Solanki searched his father at Mehsana,

Kadi and ultimately at Kainpura at the residence of Lilaben. Respondent No.1 came to know that his father was with Lilaben at Kainpura and, therefore, he had returned to Mehsana and had conveyed to his mother. According to prosecution case further, after this incident, mother and son decided to kill Shivkumar Javansinh Solanki because they were not prepared to tolerate illicit relationship of deceased with Lilaben any more. On 17th September, 2004 respondent No.1 came to Mehsana from Becharpura at about 10 A.M. Respondent No.2 was at their residence, while deceased was out somewhere. Deceased returned to residence at about 11 A.M. but on seeing respondent No.1, he again got out and returned at about 12 P.M. At that time, according to prosecution case, the respondent No.1 instructed respondent No.2 to catch hold of the deceased by legs and thereafter respondent No.1 started beating deceased by sticks. Deceased had fallen down and asked for water. Respondent No.1 gave some water to drink to the deceased but, thereafter, Shivkumar had died. Geetaben, wife of respondent No.1, was called from Becharpura. Thereafter, deceased was shifted to Hospital where he was brought dead. Thereupon both the respondents presented themselves before Mehsana

City Police Station where Police Inspector Ratanjibhai Hirjibhai Chaudhari P.W.7 recorded complaint as offered by respondent No.1 herein and registered a crime and after investigation filed charge-sheet against both the accused. The case was committed to the court of Sessions at Mehsana and was numbered as Sessions Case No.219 of 2004. Charge was framed by the learned Sessions Judge against both the accused on 19th November,2004 and was read over to the respondents to which each of the respondents pleaded not guilty. Prosecution, therefore, examined as many as seven witnesses and produced on record documents to prove its case. Circumstances appearing against each of the accused was brought to the notice of the accused by learned trial Judge in accordance with the provisions of Section 313 of the Code of Criminal Procedure where after alleging the evidence of prosecution to be false, both the accused submitted their written explanation. Accused No.1 submitted his written explanation at Exh.24 wherein he stated that on 17th September,2004 he was at village Becharpura and he received a telephonic message from his mother that his father had been unconscious and respondent No.1 should reach at Mehsana immediately and, therefore, respondent No.1 and his wife Geetaben

reached Mehsana and found his father dead. Though an attempt was made by him to shift his father to the Hospital but at Hospital he was declared dead and was advised to approach the Police Station and, therefore, with a report he approached Police Station where he and his mother both were arrested. He further stated that he was innocent and had not committed any offence. While respondent No.2 vide her written explanation at Exh.25 stated that on 17th September, 2004 her deceased husband had taken plenty of liquor and had come to the house in injured condition. She was informed that under the influence of intoxicant her husband was not behaving properly and, therefore, a crowd had beaten him. According to respondent No.2 when her husband returned to the residence, he also started beating her with stick and, therefore, she snatched stick from him and inflicted a blow of a stick on the head of the deceased. Therefore, deceased had fallen down. Thereafter, his son i.e. respondent No.1 was informed and body of the deceased was shifted to Hospital and mother and son both approached Police Station. In various papers signatures of respondent Nos.1 and 2 were taken and they were made to sit in the Police Station. She further stated that since her husband

was under the influence of alcohol and was not behaving properly, without any intention and with only intention to prevent him, a blow was inflicted by her on her husband by stick. She stated that she was innocent and had not committed any offence.

5. Trial Court heard learned APP for the prosecution as well as defence counsel and came to above conclusion to convict respondent No.2 for the offence punishable under Section 304 Part II of the Indian Penal Code and to acquit both the respondents for the charge levelled against them under Section 302 to read with Section 34 of the Indian Penal Code and hence this appeal by the State against the order of trial court acquitting both the accused.

6. Learned APP Mr.K.C.Shah for the State and learned advocate Mr.Y.M.Thakore for the respondents were heard in detail.

7. Learned APP Mr.K.C.Shah submitted that part of First Information Report, which is not confessional, leads to the inference that both mother and son with common intention caused death of deceased Shivkumar Javansinh Solanki inflicting various

injuries. Learned APP submitted that this fact is corroborated further by medical evidence that there were as many as 22 injuries on the body of the deceased. It is submitted that learned trial Judge erred in coming to the conclusion that the accused No.2 only was responsible to the extent of culpable homicide not amounting to murder falling within Second Part of Section 304 of the Indian Penal Code. It is submitted that appeal, therefore, is required to be allowed. On the other hand, learned advocate Mr.Thakore vehemently supported the judgment and order impugned in this appeal on behalf of the respondents.

8. Going through the evidence recorded during the trial it transpires through the evidence of P.W.1 Dr.Deepakkumar Vithalbhai Parmar examined at Exh.6 that he conducted post mortem of dead body of Shivkumar on 18th September,2004 at 7.30 A.M. He noted injures external as well as internal and came to the conclusion that the injuries were sufficient in ordinary course of nature to cause death. He also noted that injuries could be caused by stick and the cause of death was shock due to injuries to vital organs. He has been cross-examined by the defence

wherein he stated that deceased died gradually and not suddenly. He further deposed that had the deceased received immediate treatment, his life would have been saved. At least there were 50% possibility to save the life of deceased.

9. P.W.2 Geetaben Vinodkumar examined at Exh.8 is wife of respondent No.1 and according to her at the time of incident, she was at Becharpura and she received telephonic message whereby she was informed by her mother-in-law that her father-in-law had died and, therefore, she reached at Mehsana and at the residence of in-laws she found dead body of her father-in-law. According to her, deceased had illicit relations which caused considerable harassment to her mother-in-law. She has been cross-examined by the defence.

10. P.W.3 Lilaben Amaratji examined at Exh.9 stated that she resided at Kadi and was a widow. Deceased used to visit her house for tea and taking meals. She refused to have any illicit relations with deceased but stated that they had photographs of both of them together.

11. P.W.4 Satishbhai Shivrambhai examined at Exh.10 is Panch of Panchanamas Exh.11 and Exh.12. Exh.11 Panchanama is in respect of Inquest while Exh.12 Panchanama is Panchanama of scene of offence and the scene of offence was indicated according to Panchanama by respondent No.1. Witness Satishbhai Shivrambhai half heartedly supported the prosecution case. According to him he was called at the residence of Police Constable where a dead body was lying and blood was found on earth. He did not know whether the samples of blood were taken but he did not state that the scene of offence was indicated by respondent No.1.

12. P.W.5 Ahmdmiya Nathumiya examined at Exh.13 is also Panch of Panchanama Exh.14 by which according to the prosecution case accused Vinodkumar presented his clothes to the police in presence of panchas and clothes were attached. It is also the case of prosecution that clothes of respondent No.2 were also attached. However,this panch did not support the prosecution case and was declared hostile.

13. P.W.6 Sohanji Pradhanji examined at Exh.15 is panch of Panchanama Exh.16. It is the prosecution

case that clothes of deceased were attached by police through Panchanama at Exh.16. However,P.W.6 Sohanji Pradhanji did not support the prosecution case and was declared hostile.

14. P.W.7 Ratanjibhai Hirjibhai Chaudhari examined at Exh.17 was Police Inspector, Mehsana City Police Station at the time of incident. According to him on 17th September,2004 respondent No.1 appeared before him and led him to the scene of offence and, therefore, he recorded First Information Report of respondent No.1 and registered a crime and investigated the said crime. In deposition, First Information Report given by respondent No.1 accused, was exhibited at Exh.18, excluding the statement which amounted to confession and hit by Section 25 of the Indian Evidence Act.

15. From the above evidence, learned trial Judge came to the conclusion that the First Information Report offered by respondent No.1 was hit by Section 25 of the Indian Evidence Act and was not admissible. But according to learned trial Judge the dead body was found from the residential quarter where deceased and respondent No.2 were resided together and this

circumstance could not be explained by respondent No.2 in her further statement and, therefore, adverse inference was drawn against her under Section 114 of the Indian Evidence Act. Taking into consideration written further statement of both the accused, learned trial Judge came to the conclusion that there was no evidence at all against respondent No.1 to connect him with the crime as he was involved in the trial on the strength of Exh.18 First Information Report and as confessional portion of said document was not admissible, accused No.1 - respondent No.1 herein was entitled to clear acquittal. While, as aforesaid, raising presumption against respondent No.2 herein, learned trial Judge came to the conclusion that appreciating the evidence of P.W.1 it transpired that life of the deceased could have been saved had he received treatment immediately. Thus, according to learned trial Judge that injury was such in nature as not to cause homicidal death amounting to murder. Taking into consideration written explanation offered by respondent No.2, learned trial judge also came to the conclusion that when it is admitted that respondent No.2 had inflicted a blow by stick and taking into consideration above circumstances together, no intention can be imputed

upon respondent No.2 to cause murder of deceased. In para 17 of judgment and order impugned learned trial Judge after discussing the circumstances appearing from the evidence came to the conclusion that what had been proved from the circumstances was an act on the part of respondent No.2 without any intention but with the knowledge that by giving the blow by the stick death of deceased was probable and, therefore, respondent No.2 was held liable only for the offence punishable under Section 304 Part II of the Indian Penal Code.

16. While re-appreciating the evidence and scanning the reasons given by the learned trial Judge for the acquittal of both the respondents for the charges under Section 302 to read with Section 34 of the Indian Penal Code, it is revealed that there is no evidence at all against respondent No.1 to hold him guilty of the offence for which he was charged. First Information Report offered by respondent No.1 is admissible only to the extent of conduct of that very accused and to the extent of admission as envisaged by Section 21 of the Indian Evidence Act. All the other statements made by the accused in Exh.18 in the nature of confession cannot be proved. This principle

is well enunciated by the Apex Court in the matter of **Aghnoo Nagesia v State of Bihar as reported in AIR 1966 SC 119** wherein in Paras 10,18 and 19, the Apex Court observed that a confessional first information report by the accused to a Police Officer cannot be used against him. In para 19 the Apex Court warned that great care be taken to separate statement of the accused which is hit by Section 25 with other part of the statement. After referring to various decisions the Apex Court observed that the test of separability of such statement was misleading and entire confessional statement was hit by Section 25 and save and except as provided by Section 27 and save and except the formal part identifying the accused as maker of the report, no part of it could be tendered in evidence. What is propounded by the Supreme Court is that in confessional first information report the only severable part i.e. the maker of the confessional statement can be proved and nothing more than that would be relevant and would be hit by Section 25. In the present case as well what is proved is that accused No.1 appeared before Police Officer and made some statement and nothing more than that could be proved. The contents of Exh.18 in any

manner could not be proved by test of severability and, therefore, there is in fact no iota of evidence against accused No.1. So far as respondent No.2 is concerned, as above stated, there is no direct evidence against her except her further statement recorded under Section 313 of the Code of Criminal Procedure that she had inflicted single blow of stick on the head of the deceased. If the explanation is to be accepted in the circumstances, it must be accepted in toto leading to the fact that when deceased entered in the house he had injuries on his body. True that it was incumbent upon respondent No.2 to explain the injuries on the body of deceased when both were residing together in a quarter (a small residence). She attempted to explain injuries on the body of the deceased and there is no reason to disbelieve this explanation especially when there is no direct evidence against any of the accused for committing crime. In this view of the matter, the reasons assigned by the trial court for acquitting the respondents for the charges under Section 302 to read with Section 34 of the Indian Penal Code are extremely plausible and probable and by no stretch of reasoning it could be said that the reasons assigned for the acquittal by the trial court are palpably

wrong, manifestly erroneous and demonstrably unsustainable. This is an acquittal appeal and in an acquittal appeal, even if two views are possible, view taken by the trial court cannot be interfered with unless it is found that the same is so perverse as could not stand to reason in any manner. However, in our view, after going carefully through the evidence and the reasons assigned, there cannot be any other view except acquittal of the accused for the above charges in the given circumstances.

17. For the reasons aforesaid, following order is passed:

Appeal stands dismissed.

(J.R.Vora,J)

(Smt.Abhilasha Kumari,J)

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